(1)

Supreme Court, U.S.
FILED
APR 12 1993
OFFICE OF THE CLERK

92-1895

CASE NO.: _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

BANK OF JACKSON COUNTY,

Petitioner,

vs.

L. JAMES CHERRY and RAYMOND G. NAEYAERT,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JERRY W. GERDE
Counsel of Record for Petitioner
JOHNSTON, HARRIS, GERDE & JELKS, P.A.
239 East Fourth Street
Panama City, FL 32401
(904) 763-8421

On the
Petition: MICHEL L. STONE
PAMELA DRU SUTTON
STONE & SUTTON, P.A.
116 East Fourth Street
Panama City, FL 32401
(904) 785-7272

78 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The First Amendment Right To Petition The Government For Redress Of Grievances Clearly Forbids Officials Of The Farmers Home Administration (FmHA) From Debarring The Bank Without Due Process Of Law From Participating In FmHA Loan Guarantee Programs, When The Purpose Of The Debarment Is To Force The Bank To Abandon Or Compromise Its Position In A Civil Dispute With The FmHA

2. Whether The Debarment Of The Bank Without Due Process Of Law From Further Participation In FmHA Loan Guarantee Programs, Coupled With Allegations Of Dishonest Or Fraudulent Conduct, Infringes A Clearly Established, Protected

Liberty Interest

3. Whether The Bank's Right To Compete On An Equal Footing With Others For FmHA Loan Guarantees Is A Clearly Established Property Interest Which Cannot Be Extinguished Without Due Process Of Law

LIST OF ALL PARTIES

Pursuant to Supreme Court Rules 14.1(b) and 29.1, Petitioner states that all persons and entities who were parties to the judgment whose review is here sought are named in the caption, and that the Bank of Jackson County has no parent or subsidiary corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

LIST OF ALL PARTIES iii

TABLE OF CONTENTS iv

TABLE OF CITATIONS vii

REPORTS OF OPINIONS BELOW 1

GROUNDS ON WHICH JURISDICTION INVOKED 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED . . 3

STATEMENT OF THE CASE 13

I. FACTUAL BACKGROUND 13

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW 22

BASIS FOR FEDERAL JURISDICTION BELOW 26

ARGUMENT 27

POINT I: The First Amendment Right To Petition The Government For Redress Of Grievances Clearly Forbids Officials Of The Farmers Home Administration (FmHA) From Debarring The Bank Without Due Process Of Law From Participating In FmHA Loan Guarantee Programs, When The Purpose Of The Debarment Is To

Force The Bank To Abandon Or Compromise Its Position In A Civil Dispute With The FmHA 27

POINT II: The Debarment Of The Bank Without Due Process Of Law From Further Participation In FmHA Loan Guarantee Programs, Coupled With Allegations Of Dishonest Or Fraudulent Conduct, Infringes A Clearly Established, Protected Liberty Interest 39

POINT III: The Bank's Right To Compete On An Equal Footing With Others For FmHA Loan Guarantees Is A Clearly Established Property Interest Which Cannot Be Extinguished Without Due Process Of Law 56

CONCLUSION 65

CERTIFICATE OF SERVICE 67

TABLE OF CITATIONS

Cases **Page**

Anderson v. Creighton, 483 U.S. 635 (1987) 37

Arrow Air, Inc. v. United States, 649 F. Supp. 993 (D.D.C. 1986) . 42

Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985) 59, 60

ATL, Inc. v. United States, 736 F.2d 677 (Fed. Cir. 1984) 42

Bank of Jackson County v. Cherry, 980 F.2d 1354 (11th Cir. 1992) 1, 25, 51

Bank of Jackson County v. Cherry, 980 F.2d 1362, (11th Cir. 1993) (on rehearing) 1, 2, 25, 29, 31, 34, 36, 43, 65

Bartel v. Federal Aviation Administration, 725 F.2d 1403 (D.C. Cir. 1984) 42

Berlanti v. Bodman, 780 F.2d 296 (3d Cir. 1985) 61

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 44

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29

L.Ed.2d 619 (1971) . 22, 26, 30, 65

Board of Regents v. Roth, 408 U.S. 564 (1972) 41

Boyd v. Adams, 518 F.2d 83 (7th Cir. 1975) 30

Conset Corporation v. Community Services Administration, 655 F.2d 1291 (D.C. Cir. 1981) 42

DeLoach v. Bevers, 922 F.2d 620 (10th Cir. 1990) 35

Doe v. United States Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) 55

Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) . 32, 57, 58, 60-63

Green v. Brantley, 719 F. Supp. 1570 (N.D. Ga. 1989) 42

Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987) 27, 30

Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978) 45

Losch v. Borough of Parkesburg, 736 F.2d 903 (3d Cir. 1984) 35

Lusby v. T.G.& Y. Stores, Inc., 749 F.2d 1423 (10th Cir. 1984), *vacated for reconsideration*, ---U.S.---, 106 S.Ct. 40 (1985) 30

MacDonald v. Musick, 425 F.2d 373 (9th

Cir.), *cert. denied*, 400 U.S. 852 (1970) 30

Mainelli v. United States, 611 F. Supp. 606 (D.R.I. 1985) 42

Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984) 34, 35, 38

Mosrie v. Barry, 718 F.2d 1151 (D.C. Cir. 1983) 54

Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2d Cir. 1975) 60

NAACP v. Button, 371 U.S. 415 (1963) 27

Norwell v. City of Cincinnati, 414 U.S. 14 (1973) 35

Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980) 39-41, 43-45, 51, 53, 54

Paul v. Davis, 424 U.S. 693 (1976) . 41

Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940) 58

Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 534 F. Supp. 1139 (D.D.C. 1982) 42

Sexton v. Ryan, 804 F.2d 26 (2d Cir. 1986) 30

Shermco Industries, Inc. v. Secretary of

the Air Force, 584 F. Supp. 76 (N.D. Tex. 1984) 42

Town of Newton v. Rumery, ---U.S.---, 107 S.Ct. 1187 (1987) . . . 30, 31

Transco Securities, Inc. v. Freeman, 639 F.2d 318 (6th Cir.), *cert. denied* 454 U.S. 820 (1981) 41

UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 27

Wayte v. United States, 470 U.S. 598 (1985) 28, 33

U.S. Constitution **Page**

U.S. CONST. amend. I 3, 23, 27, 29, 30, 34, 36, 38

U.S. CONST. amend. V 3, 22, 41

Statutes **Page**

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 26

28 U.S.C. §§ 1331 26

28 U.S.C. §§ 1346(b), 2671-2680 . . 59

28 U.S.C. §§ 2201 and 2202 26

42 U.S.C. § 1983 61

42 U.S.C. § 2412 26

Regulations **Page**

7 C.F.R. Ch. XVIII, Part 1924, Subpart E, §§ 1924.201-1924.220 (1988) 4, 5, 7, 9, 18, 32, 58, 64

7 C.F.R. Ch. XVIII, Part 1980, Subpart A, §§ 1980.1-1980.100 (1988) 9, 10, 17

Other Authorities **Page**

Comment, "Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors," 36 Am. U. L. Rev. 693 (1987) 42

Note, "Government Contracts - Nonresponsibility Determinations - The Federal Government Violates a Contractor's Due Process Liberty Interest by Failing to Provide Prior Notice and an Opportunity to Rebut Charges Contained in Nonresponsibility Determinations Based on Lack of Integrity; Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980)," 50 Geo. Wash. L. Rev. 90 (1981) 42

REPORTS OF OPINIONS BELOW

Opinions of the Eleventh Circuit Court of Appeals herein are reported at:

1. ***Bank of Jackson County v. Cherry***, 980 F.2d 1354 (11th Cir. Fla. 1992) (originally reported at 966 F.2d 1406);
2. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362 (11th Cir. Fla. 1993) (on rehearing).

GROUNDS ON WHICH JURISDICTION INVOKED

Jurisdiction is invoked to review the judgment on rehearing of the Eleventh Circuit Court of Appeals, entered January 11, 1993. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362. That opinion replaced an earlier 2-1 opinion rendered by the same panel and later withdrawn, 980 F.2d 1354.

The discretionary certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision conflicts with decisions of other United States court of appeals on the same and similar matters. The decision treats important federal constitutional questions in a way that conflicts with applicable decisions of this Court or deals with questions that have not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. **U.S. CONST. amend. I:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. **U.S. CONST. amend. V:**

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in

time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

III. 7 C.F.R. Ch. XVIII, Part 1924, Subpart E, §§ 1924.201-1924.220 (1988), governs suspension and debarment proceedings undertaken by the Farmers Home Administration. The most pertinent provisions are here set out verbatim:

§ 1924.201 Purpose.

This subpart prescribes the action to be taken by the Farmers

Home Administration (FmHA) when there is need for administrative action against any person, or any representative or affiliate thereof.

§ 1924.202 Policy and scope.

This subpart applies to both individual--and group-type loans or grants in connection with any program administered by FmHA. Any action to be taken under this subpart is to be corrective or for the protection of the public interest.

§ 1924.203 Definitions.

(a) *Person.* For the purposes of this subpart a person is an individual, unincorporated association, trust, corporation, partnership, or other entity, such as a purchaser, builder, contractor,

dealer, supplier, manufacturer, realtor, surety, insurance company, broker, packager, salesman, escrow agent, sales agent, lender, holder, engineer, architect, inspector, or attorney, or any representative, affiliate, or successor in interest thereof.

(b) *Debarment*. Debarment is the exclusion from participation in any FmHA program for a reasonable period of time commensurate with the seriousness of the person's offense or failure, or the inadequacy of his performance.

(c) *Suspension*. Suspension is the temporary disqualification from FmHA programs in conjunction with debarment proceedings.

* * *

§ 1924.213 Sanctions.

(a) *General.* Debarment and suspension are drastic actions which may severely affect the economic well-being of the persons debarred or suspended. They shall not be based upon an unsupported accusation. In assessing whether adequate evidence exists for invoking this procedure, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to the inferences which may be properly drawn from the existence or absence of affirmative facts.

(b) *Debarment.* Debarment may be imposed by the State Director,

for a specified period of time, generally not to exceed 3 years, except in more serious cases. Debarment may also be imposed for an indefinite period of time, pending correction of the conditions which led to the debarment.

(c) *Suspension.* Suspension may be temporarily imposed by the State Director pending the debarment determination only when immediate action is necessary to protect the interest of the FmHA and its program borrowers or grantees. The interests of the person to be suspended must be reasonably deemed to be of less importance than that of FmHA or its program participants. Suspension must be based on adequate evidence supporting at least one of

the grounds listed under § 1924.214. When a debarment determination adverse to the person is appealed, suspension also may be imposed for the appeal period only.

* * *

IV. 7 C.F.R. Ch. XVIII, Part 1980, Subpart A, §§ 1980.1-1980.100 (1988), contains general regulations applicable to the FmHA's guaranteed loan programs. Particularly pertinent here are the following:

* * *

§ 1980.6 Definitions and abbreviations.

* * *

(a)(14) *Lender.* The person or organization making and servicing the loan or advancing and servicing the line of credit which is

guaranteed under the provisions of the appropriate Subpart. The lender is also the party requesting a guarantee.

* * *

§ 1980.13 Eligible lenders.

* * *

(b) *An eligible lender is:*

Any Federal or State chartered bank, Federal Land Bank, Production Credit Association, Bank for Cooperatives, Savings and Loan Association, Building and Loan Association, mortgage company that is a part of a bank-holding company, or an insurance company that is regulated by the National Association of Insurance Commissioners. The above entities must be subject to credit examination and supervision by

either an agency of the United States or a State. * * * Only those lenders listed in this paragraph are eligible to make and service guaranteed loans and such lender must be in good standing with its licensing authority and has [sic] met licensing, loanmaking, loan servicing, and other requirements of the State in which the collateral will be located, and the loanmaking and/or loan servicing office requirements in paragraph (b)(3) of this section. A lender must have the capability to adequately service the loan for which a guarantee is requested.

* * *

(5) *Debarment.* See Part 1924, Subpart E of this chapter.

* * *

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Bank of Jackson County [hereinafter "the Bank" or "BJC"] , a small Northwest Florida state-chartered bank since 1934, with offices in Graceville and Marianna, Florida, participated as an eligible lender in Farmers Home Administration programs since 1980. Twenty to twenty-five percent of its outstanding loans were agricultural. From 1984 through June 1988, the FmHA had guaranteed Bank of Jackson County loans and lines of credit totalling $1,065,990.95.

Defendant L. James Cherry was the Florida State Director of the Farmers Home Administration [hereinafter FmHA] since 1985 (except for the period June 22, 1988 to December 1, 1988). As such,

he has authority over all FmHA operations in Florida. Previously, he worked for the FmHA in Washington, D.C. He was admitted to the Florida bar in 1972 and practiced law in Florida before his employment with the FmHA. Defendant Raymond G. Naeyaert was Florida Chief of Farmer Programs, second only to Cherry in all matters concerning farmers and farming in Florida, since the early 1980s, and worked for the FmHA since 1978.

Throughout the 1980s, the Bank of Jackson County and the FmHA had an on-going business relationship, which included co-participation in loans to farmers, the Bank's issuance of loans to farmers guaranteed by FmHA, and the Bank serving as a depository for the FmHA's treasury limited account.

In 1982, a dispute arose between the Bank and FmHA concerning the distribution of funds collected for the sale of cows repossessed from the Ferrises, dairy farmers in Graceville, Florida, who had borrowed money from both lenders. For approximately four years, up to July 15, 1986, the parties attempted but were unable to resolve the dispute over how these funds should be divided. Between July 15, 1986 and April 15, 1988, there was no communication, oral or written, between the BJC and FmHA or its agents, concerning the Ferris cow proceeds dispute. During this period, the Bank and FmHA engaged, amicably, in numerous loan transactions. Defendants Cherry and Naeyaert were aware of no problems in FmHA's working relationship with the Bank other than the dispute over the

distribution of the Ferris cow proceeds.

On April 14, 1988, Defendant Naeyaert was present at the Holmes County, Florida FmHA office. From his county supervisor, J. Aubrey Sapp, he learned of the imminent issuance of a conditional commitment on a loan guarantee to the Bank on a loan to farmer Adron Miller. Naeyaert told Sapp that FmHA "shouldn't be working with them [i.e., the Bank]" because of "past business dealings on Elmer and Shirley Ferris." He instructed Sapp not to issue the conditional commitment on the Miller loan and not to issue "anything on . . . any other case to [the] Bank of Jackson County." The next day, Sapp phoned Bank vice president Heisler and informed him of Naeyaert's instructions.

The commitment was subsequently issued to a different bank.

On June 10, 1988, the Bank received a letter dated June 1, 1988, from Cherry (drafted by Naeyaert), terminating the business relationship with the Bank and announcing that FmHA would not enter into any further loan guarantees of BJC loans and would terminate its Treasury Limited Account at the Bank. The letter cited the Ferris cow dispute and stated:

> We have honestly tried to negotiate a settlement of this issue to no avail. You have steadfastly refused to negotiate in what we consider to be good faith.

Cherry and Naeyaert admit that they did not follow the procedures in the FmHA debarment and suspension regulations[1] in

---

[1] The general regulations in effect at that time appear at 7 C.F.R. Ch. XVIII, Part 1980, Subpart A, §§ 1980.1-1980.100 (continued...)

taking the action embodied in the June 1, 1988 letter.

On July 11, 1988, Glenn Walden, then Acting Director of the Florida FmHA, signed a letter drafted by Naeyaert to the Bank, referring to an earlier settlement offer on the Ferris cow proceeds dispute, and stating in part:

> I am confident that when you consider the alternatives, you will agree to a settlement more in line with what we are able to accept so we may discontinue the proposed litigation and resume normal relations between the bank and FmHA.

On September 9, 1988, a law suit was

---

[1](...continued)
(1988). The regulations specifically governing debarment and suspension of "eligible lenders" and others appear at 7 C.F.R. Ch. XVIII, Part 1924, Subpart E, §§ 1924.201-1924.220 (1988). (The regulations were later amended and published on April 11, 1989, at 54 Fed. Reg. 14333.) Pertinent provisions of the regulations are set forth verbatim at the outset of this petition.

filed by FmHA against BJC in the United States District Court for the Northern District of Florida, Panama City Division (Case No. 88-50117), alleging the Bank converted FmHA funds comprising part of the Ferris proceeds. The suit sought damages including interest.

On February 28, 1989, Naeyaert instructed FmHA Jackson County Supervisor Charles Snell not to approve the Bank's application for a guarantee of a substantial line of credit to Charles M. Patrick, a Jackson County farmer. Naeyaert's letter cited the existence of the law suit between the United States and BJC and the alleged failure of BJC to negotiate in good faith.

On January 24 and March 1, 1989, Cherry approved annual renewals of loan guarantees originally made for three-year

terms, each of which had been entered into prior to June 1, 1988. In each case, Cherry stated that the renewal of the guarantee was an exception to the policy of not doing business with the Bank and that that policy remained in effect.

On May 5, 1989, Thomas W. Wilder, President of BJC, talked in person with L. James Cherry about the Ferris cow litigation, in Marianna, Florida. Wilder pointed out that Cherry's action had resulted in effective debarment of the Bank from participation in the guaranteed loan program without the benefit of the requirements of FmHA's own regulations. Cherry responded that, as soon as the case which FmHA had filed against the Bank was settled, the Bank would be reinstated to participation in

the guaranteed loan program.

Already, on account of the debarment, the Bank had lost at least two identifiable loans in the Miller and Patrick transactions, from which it would have realized approximately $250,000.00, because it was unable to command FmHA loan guarantees.

On April 16, 1990, the U.S. District Court rendered judgment in accounting in U.S. v. Bank of Jackson County. The Court found that FmHA had voluntarily withdrawn its conversion claim against the bank. No interest was sought at trial and none was awarded by the Court. The judgment for amounts allotted to FmHA was satisfied by payment tendered twelve days after the judgment was rendered. On May 22, 1990, both Cherry and Naeyaert stated at deposition that their

prohibition against BJC doing business with the FmHA remained in effect, notwithstanding the termination of the litigation and satisfaction of the judgment.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

This action was commenced on May 16, 1989, with the filing of a complaint for damages and for declaratory and injunctive relief to redress violations of the Bank's First and Fifth Amendment rights due to its debarment, without due process of law, from the Florida FmHA's loan guarantee program. The damages portion of the suit was brought against the Florida state director of FmHA and his chief of farmer programs, individually, under ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***, 403 U.S. 388, 91 S.Ct. 1999,

29 L.Ed.2d 619 (1971).

The defendants moved to dismiss or in the alternative for summary judgment, claiming, inter alia, qualified immunity. The court, Hon. Roger Vinson, J., granted the motion in part as to the Bank's First Amendment claim and denied it as to procedural due process. Order dated March 20, 1990. [A-77]

On July 19, 1990, the Defendants' renewed motion to dismiss and for summary judgment was deemed filed, and on July 23, 1990, the Bank filed its motions for partial summary judgment on the issue of permanent injunctive relief and for partial summary judgment on the issue of damages liability on the due process claims.

On May 13, 1991, the court rendered its Order granting the Bank's motion for

summary judgment on its claim for injunctive relief and ordered the Defendants in their official capacities to reinstate the Bank as a viable participant in FmHA programs. [A-25] In addition, the court granted the Defendants' motion for summary judgment on the individual damages claims. *Id.* The court held that the Bank had no constitutional right to due process, that the Defendants' violation of their own regulations requiring due process was not actionable for damages, and that, in the alternative, the individual Defendants were qualifiedly immune because the rights at issue were not clearly established. Judgment accordingly was entered on May 14, 1991.

An appeal was filed on June 11, 1991. On July 27, 1992, a panel of the

United States Court of Appeals for the Eleventh Circuit issued its opinion affirming, 2-1, the finding of qualified immunity.[2] ***Bank of Jackson County v. Cherry***, 980 F.2d 1354 (11th Cir. 1992) (originally 966 F.2d 1406).

On petition for rehearing, the same panel adhered to its earlier decision, amplifying its reasoning somewhat. ***Bank of Jackson County v. Cherry***, 980 F.2d 1362 (11th Cir., January 11, 1993).

Of this judgment the Bank here seeks review.

---

[2] Cherry and Naeyaert did not appeal the district court's grant of injunctive relief requiring the reinstatement of the Bank as a "viable participant" in the Florida FmHA's guaranteed loan program.

BASIS FOR FEDERAL JURISDICTION BELOW

Jurisdiction in the district court was premised on 28 U.S.C. §§ 1331, 2201 and 2202, 42 U.S.C. § 2412 (Equal Access to Justice Act), and the doctrine enunciated in ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Jurisdiction in the court of appeals was premised on 28 U.S.C. § 1291, an appeal as of right from a final order and judgment that disposed of all claims with respect to all parties. The appeal was timely taken, final judgment having been entered on May 14, 1991, and the notice of appeal having been filed on June 11, 1991.

ARGUMENT

POINT I: The First Amendment Right To Petition The Government For Redress Of Grievances Clearly Forbids Officials Of The Farmers Home Administration (FmHA) From Debarring The Bank Without Due Process Of Law From Participating In FmHA Loan Guarantee Programs, When The Purpose Of The Debarment Is To Force The Bank To Abandon Or Compromise Its Position In A Civil Dispute With The FmHA

The Bank was indefinitely debarred in an attempt by Cherry and Naeyaert to force it to come to heel in a longstanding dispute over the Ferris cow proceeds. The purpose was to prevent or interfere with the Bank's exercise of its First Amendment rights, among which is the right of access to the courts. ***NAACP v. Button***, 371 U.S. 415 (1963); ***UMW v. Illinois State Bar Ass'n***, 389 U.S. 217 (1967); ***Haynesworth v. Miller***, 820 F.2d

1245 (D.C. Cir. 1987).[3]

For example, the Walden letter of July 11, 1988, drafted by Naeyaert, is unmistakable in its coercive import:

> I am confident that when you consider the alternatives, you will agree to a settlement more in line with what we are able to accept so we may discontinue the proposed litigation and resume normal relations between the bank and FmHA.

Even more compelling is the testimony of Bank President Wilder that, in a May 1989 conversation with Cherry, he pointed out that the FmHA had debarred the Bank without a hearing as required by FmHA regulations. Cherry's response was that, as soon as the Ferris cow case was "settled," the Bank would be "reinstated"

---

[3] The right to petition for redress of grievances is generally subject to the same constitutional analysis as the Free Speech Clause. ***Wayte v. United States***, 470 U.S. 598, 610 n.11 (1985).

as a participant in the federally guaranteed loan program. Wilder affidavit, July 10, 1989, ¶ 24. [A-113-114]

The Eleventh Circuit agreed that the defendants used the debarment "as a lever to coerce favorable settlement of the Ferris cow dispute," a tactic which "has no place in government." 980 F.2d at 1369. Yet the court did not reach the question whether the government's use of debarment to coerce the favorable settlement of a civil dispute unconstitutionally infringes upon a civil litigant's First Amendment rights, because it held that those rights were not clearly established. *Id.* at 1371.

The court's decision conflicts with established law in several circuits, which it tries, unconvincingly, to

distinguish. The District of Columbia Circuit has squarely held that "retaliatory prosecution constitutes an actionable First Amendment wrong redressable under ***Bivens*** . . . ." ***Haynesworth v. Miller***, ***supra***, 820 F.2d at 1255. There, the Court upheld a claim against D.C. police, officials and the municipality that an unmerited prosecution had been undertaken in retaliation for Haynesworth's refusal to surrender his right to challenge official misconduct in court. Several other circuits have reached the same conclusion.[4]

---

[4] ***See e.g.***, ***Sexton v. Ryan***, 804 F.2d 26 (2d Cir. 1986); ***Boyd v. Adams***, 518 F.2d 83 (7th Cir. 1975); ***MacDonald v. Musick***, 425 F.2d 373 (9th Cir.), ***cert. denied***, 400 U.S. 852 (1970); ***Lusby v. T.G.& Y. Stores, Inc.***, 749 F.2d 1423 (10th Cir. 1984), ***vacated for reconsideration***, ---U.S.---, 106 S.Ct. 40 (1985).

(continued...)

The court below attempted to distinguish the retaliatory prosecution cases on two grounds. First, the cases involve criminal prosecution, which "triggers an array of constitutional, historical, and statutory considerations" inapplicable here. 980 F.2d at 1370. Reasonable officials, the court reasoned, could not have seen the similarity between the "loss of freedom" and "lasting stigma" associated with criminal prosecution and the consequences of debarment. *Id.*

Petitioner contends the similarity

---

[4](...continued)
Town of Newton v. Rumery, ---U.S.---, 107 S.Ct. 1187 (1987), is not to the contrary. ***Rumery*** simply held that the mere possibility of over-reaching should not invalidate an agreement not to sue where the evidence showed that the agreement was entered into voluntarily, and that the prosecutor acted reasonably and pursued legitimate law enforcement goals.

is striking. In the progenitor of a long line of debarment cases, ***Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964), then circuit judge (later Chief Justice) Burger pointed out that debarment is a penalty that "can carry with it grave economic consequences." 334 F.2d at 574.[5] Moreover, the FmHA's own regulations speak directly to the point:

> Debarment and suspension are drastic actions which may severely affect the economic well-being of the persons debarred or suspended. . . .

7 C.F.R. § 1924.213(a). On the question of harm, the criminal/civil distinction is an abstraction, itself unlikely to occur to officials bent on penalizing the

---

[5] In the present case, of course, the grave economic detriment of debarment is documented in the affidavit of Thomas W. Wilder, July 10, 1989, ¶¶ 18-23. [A-109-113] The aspects of the harm suffered by the Bank are the same as the factors listed in ***Gonzalez***, 334 F.2d at 574.

exercise of constitutional rights to gain their ends.

Actually, the criminal/civil distinction makes the present case more compelling than the retaliatory prosecution cases. There, the weighty governmental interest in unfettered prosecutorial discretion[6] must be considered against the claim that an individual's access to courts is being held hostage to official action. Here, there is no countervailing interest at all. The defendants have no discretion to violate their own regulations and make ad hoc debarment decisions. They have no power to debar without due process. Certainly they cannot claim the power to

---

[6] See the discussion of factors counseling judicial reluctance to interfere with prosecutorial discretion in ***Wayte v. United States***, ***supra***, 470 U.S. at 607-608.

do both of these things for the purpose of punishing or preventing the exercise of First Amendment rights.

However, the court below found a second basis for distinguishing the retaliatory prosecution cases in the "many legitimate objectives" of the officials' "pursuit of settlement". 980 F.2d at 1370. The distinction fails. There is a similar benefit to the public fisc if lawsuits against the police are deterred, yet retaliatory prosecution and coerced waiver of claims are not permitted on that account. As the Seventh Circuit pointed out in ***Matzker v. Herr***, 748 F.2d 1142, 1150 (7th Cir. 1984):

> [a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable . . . even if the act, when taken for a different reason, would have

been proper.

See also, ***Norwell v. City of Cincinnati***, 414 U.S. 14 (1973); ***DeLoach v. Bevers***, 922 F.2d 620 (10th Cir. 1990); ***Losch v. Borough of Parkesburg***, 736 F.2d 903 (3d Cir. 1984).

The court also attempted to distinguish precedent that did not involve criminal prosecution. In ***Matzker v. Herr***, 748 F.2d 1142 (7th Cir. 1984), a prisoner complained to a judge about being held in segregation. In retaliation, the prisoner claimed, a jail official refused to transfer him to a safer cellblock. The Seventh Circuit held that this stated a claim for damages against the official. ***See also Milhouse v. Carlson***, 652 F.2d 371 (3d Cir. 1981); ***McDonald v. Hall***, 610 F.2d 16 (1st Cir. 1979). In a footnote, the court below

distinguished ***Matzker*** for the same reasons as the retaliatory prosecution cases, 980 F.2d at 1370-1371, although ***Matzker*** did not involve criminal prosecution.

Ultimately, the Eleventh Circuit's attempts to show that the present case is not similar enough to established precedent conflict with its own round condemnation of the officials' conduct. If that conduct has no place in government, surely it is because it violates clearly established rights of which reasonable officials have no cause to be uncertain. Unpunished access to court as an aspect of the First Amendment is neither novel nor vexed. Where the court goes astray is in its emphasis on the criminal/civil dichotomy. It is clearly established that it is improper

to ***penalize*** the exercise of First Amendment rights; it does not matter whether that penalty takes the form of "criminal" or "civil" sanction, as long as the sanction is not ***de minimis***. Nor does it matter whether the precise form of penalty fashioned by the imagination of overreaching officials has occurred in the past. The only thing that matters for purposes of qualified immunity analysis is that the wrongfulness of the official action be obvious:

> This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Least persuasively of all, the Eleventh Circuit held that the connection

between the debarment and the Bank's First Amendment rights was too attenuated to overcome official immunity. The court emphasized the fact that the debarment did not in fact dissuade the Bank from defending its position in the Ferris cow litigation.

This misses the point entirely. Effective redress for the violation of rights must not depend upon acquiescing in their destruction. The First Amendment is violated not merely when its exercise is prevented or restricted, but also when a penalty is paid for its exercise. In ***Matzker***, the penalty was the refusal of jail officials to order a transfer to a safer cellblock. Here, the penalty was the debarment. The Bank's right to sue for damages does not depend upon its actually having submitted to the

official lawlessness any more than Matzker's did.

POINT II: The Debarment Of The Bank Without Due Process Of Law From Further Participation In FmHA Loan Guarantee Programs, Coupled With Allegations Of Dishonest Or Fraudulent Conduct, Infringes A Clearly Established, Protected Liberty Interest

The court below parted company with the other circuits in failing to find the denial of a clearly established liberty interest. At least since ***Old Dominion Dairy Products, Inc. v. Secretary of Defense***, 631 F.2d 953 (D.C. Cir. 1980), it has been widely understood that the debarment of a government contractor, when it occurs under a cloud of alleged dishonest or fraudulent conduct, implicates a liberty interest that is entitled to due process protection.

Here, the Bank was charged, by the heads of the Florida FmHA, with a lack of integrity for failing to deal in good faith with the government in the Ferris cow dispute. This stigma was accompanied by a loss of business opportunity, namely, the refusal to entertain the Bank's future applications for FmHA loan guarantees. At least two identifiable loans were lost, from which the Bank would have realized more than $250,000. *See* Affidavit of Wilder, July 10, 1989, ¶ 20. [A-111-112][7]

The case is indistinguishable in this respect from ***Old Dominion***, ***supra***.

---

[7] As already pointed out, the Bank had participated as an eligible lender in FmHA programs since 1980. Affidavit of Wilder, July 10, 1989, ¶ 4. [A-98] From 1984 through June 1988, the FmHA had guaranteed Bank loans and lines of credit totalling $1,065,990.95. *Id.* ¶ 18. [A-109-110]

There, a contractor was not told, before two "non-responsibility" *determinations*, that it was under investigation, and was told only afterward that the determinations were based on the lack of a "satisfactory record of integrity."[8] Citing ***Board of Regents v. Roth***, 408 U.S. 564 (1972), and ***Paul v. Davis***, 424 U.S. 693 (1976), the Court held

> it is precisely the "accompanying loss of government employment" and the "foreclosure from other employment opportunity" which is the injury resulting from the Government defamation complained of in this case. As a result, we hold that a liberty interest recognized by the Fifth Amendment is implicated in this case.

631 F.2d at 966.

Since ***Old Dominion***, numerous other

---

[8] ***Old Dominion*** did not involve the blanket proscription of future dealings that we have here.

cases have affirmed the liberty interest analysis. *See, e.g., Transco Securities, Inc. v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied* 454 U.S. 820 (1981); ***ATL, Inc. v. United States***, 736 F.2d 677 (Fed. Cir. 1984); ***Mainelli v. United States***, 611 F. Supp. 606 (D.R.I. 1985); ***Shermco Industries, Inc. v. Secretary of the Air Force***, 584 F. Supp. 76 (N.D. Tex. 1984); ***Green v. Brantley***, 719 F. Supp. 1570 (N.D. Ga. 1989); ***Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers***, 534 F.Supp. 1139 (D.D.C. 1982); ***Arrow Air, Inc. v. United States***, 649 F. Supp. 993 (D.D.C. 1986); ***Bartel v. Federal Aviation Administration***, 725 F.2d 1403 (D.C. Cir. 1984); ***Conset Corporation v. Community Services Administration***, 655 F.2d 1291

(D.C. Cir. 1981).[9]

Admitting that "the question is a close one," the court nonetheless distinguished this case on two grounds: viz., the stigmatizing allegation was neither sufficiently publicized nor sufficiently injurious to deprive the Bank of its liberty. 980 F.2d at 1367.

As to publication, the Court noted that the allegation was circulated by the defendants only within FmHA and to its

---

[9] *See generally*, Comment, "Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors," 36 Am. U. L. Rev. 693 (1987); Note, "Government Contracts - Nonresponsibility Determinations - The Federal Government Violates a Contractor's Due Process Liberty Interest by Failing to Provide Prior Notice and an Opportunity to Rebut Charges Contained in Nonresponsibility Determinations Based on Lack of Integrity; Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980)," 50 Geo. Wash. L. Rev. 90 (1981).

lawyers. Although the Bank was obliged to tell its borrowers of its inability to participate in the FmHA guaranteed loan program, the Court rejected this potentially limitless (for who knows how many persons the borrowers told?) "outside" publication because the Bank cannot say how many potential customers it lost, nor did the defendants require the Bank to disclose the reason for the debarment.

More publication than this is not required by the seminal debarment case, ***Old Dominion***. There, distinguishing one of the cases relied upon by the court here, the D.C. Circuit stated:

> Although the Government has never attempted to suggest otherwise, we note that there is no problem of a lack of publication of the damaging characterization as was present in ***Bishop v. Wood***, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d

> 684 (1976). In the present case, ***the determination that Old Dominion lacked integrity had already been communicated through Government channels and would undoubtedly have been recommunicated every time ODDPI bid on a subsequent contract.***

631 F.2d at 966 n.24. This is precisely the kind of "in-house" but nonetheless devastating scope of publication present here.

Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978), an opinion relied upon by the ***Old Dominion*** court, dealt similarly with the publication issue. The case concerned only intra-agency publication:

> The Commission points out that its findings will not be made public and are made available to the various agencies only on a need to know basis. However, the federal government is composed of many different agencies and departments, all of which could obtain the information under various circumstances. ***In effect, Larry has been stigmatized throughout the entire federal***

> *government*. He is deprived of the opportunity to work in any capacity for any branch of the government.

Larry v. Lawler, 605 F.2d 954, 958 (7th Cir. 1978) (emphasis added). *See also Doe v. United States Department of Justice*, 753 F.2d 1092, 1113 n.24 (D.C. Cir. 1985).

Nor is it enough to say that the Bank failed to identify the customers it lost. We deal here, after all, with that part of the liberty interest injury which mimics defamation. It is a familiar characteristic of per se defamation (as surely this was) that general damages are presumed, since the law has long understood that among the pernicious effects of this tort is the fact that those who are influenced by the slander to the victim's detriment seldom stand up to be counted.

More importantly, the Bank has no way of knowing how many customers it lost because they were not referred to the Bank by FmHA.

It is not significant that the Bank was not required to tell its customers the reason for the debarment. Even if the Bank did not owe a (foreseeable) fiduciary duty to disclose the allegation to its farm borrowers, good sense dictated that it do so. The unspecified slur often does more injury than the details. Telling its borrowers that the Government claimed to think the Bank was crooked, and why, was probably the Bank's only method of ***minimizing*** the damage, since at least some of the farmers, trusting their bankers, might have been expected to believe them.

On the question of injuriousness,

the court minimized the Bank's showing and exaggerated the relative injury in other debarment cases. The court stated that FmHA continued to guaranty the Bank's loan renewals in Florida, that it guaranteed all of the Bank's Alabama loans, and that the Bank remained free "to do business with any of the numerous federal agencies that deal with banks."

The facts are less sanguine. FmHA chose to renew only *two* loans when they came due---and in each case the defendants took pains to emphasize that this was an exception to the policy of no business, and did not mean that any further loan renewal would be granted.[10] There was no evidence that

---

[10] Moreover, this was not *new* business. In each case, the loans had been made *before* the debarment for a three-year term, and the contract simply called for yearly renewal upon review of (continued...)

the Florida bank did a substantial amount of business with Alabama farmers.

As for the Bank's "freedom" to deal with other government agencies, it is an illusion. Unlike many other government contractors, banks are primarily local entities, dealing with borrowers from the local community. Obviously the Bank could not service loans elsewhere in the country, nor could it qualify (debarment aside) under the FmHA's regulations as an "eligible lender" in far-flung places. Banks are service institutions. They are not purveyors of goods to multiple government agencies. Being blacklisted by the Department of Defense, or the General Services Administration, for example, would have had no effect on the Bank. Short of attempting to extend the

---

[10](...continued)
the borrower's operation.

blacklist to Alabama FmHA, with whom the Bank did some business, Cherry and Naeyaert did all the harm they could do. That they did not place the Bank's name on a government-wide or nationwide debarment list hardly mitigates the damage.

The effect on the Bank of being totally cut off from Florida farm loan guarantees must be gauged against the fact that this is a small bank in rural northwest Florida. Twenty to twenty-five percent of its outstanding loans were agricultural. The Bank had participated as an eligible lender in FmHA programs since 1980. From 1984 through June 1988, the FmHA had guaranteed Bank loans and lines of credit totalling $1,065,990.95. Although, as already pointed out, it is inherently problematic to identify

specific business losses in the debarment situation, the Bank was able to identify at least two loans lost in the debarment, from which it would have realized more than $250,000. Affidavit of Wilder, July 10, 1989, ¶¶ 4, 18, 20. [A-98, 109-110, 111-112] On summary judgment, all of this went completely unrebutted by the defendants.

The court appeared to make out an insubstantiality determination only in relative terms, by comparing the Bank's losses with the "scorched earth" of ***Old Dominion*** and other cases. But as Judge Godbold pointed out in his dissent from the original panel opinion, nothing in those cases required total destruction as a matter of law. 980 F.2d at 1362.

Even the perception of ***Old Dominion, ATL, Ind. v. United States***, 736 F.2d 677

(Fed. Cir. 1984), and ***Transco Sec., Inc. v. Freeman***, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981), as "total destruction" cases is problematic. ***ATL*** was a suspension case, not a debarment. While it is true that the construction contractor there was "a small business concern whose work is done almost entirely with the Federal Government," no attempt was made to show that ATL was not free to engage itself elsewhere. As the court noted:

> ATL is still theoretically free, in the face of the 12- or 18-month suspension, to pursue non-government contract work. A small business choosing to put nearly all its eggs in one Government contracts basket must be expected to bear some responsibility for the risk that that basket could, as a result of the contractor's misconduct, temporarily or even permanently be snatched away -- with the required procedural safeguards here at issue.

736 F.2d at n.31. The Bank here, of course, and its farm borrowers, were not free even theoretically to obtain similar loan guaranties elsewhere.

Similarly, ***Transco*** was a suspension case, involving a potential maximum of 18 months before a hearing was required under the regulations there at issue. The contractor was in the business of providing security services, and the opinion does not state that no private market existed.

Old Dominion itself involved not even suspension but nonresponsibility determinations as to two contracts. The contractor was a small business choosing to supply dairy products almost exclusively to the military. No one would suggest that other markets for milk were unavailable.

It may be possible to demonstrate that the injuries in the above cases were greater than BJC's loss in both absolute dollars and as a proportion of business. However, none of those cases involved a debarment of indefinite duration and none involved debarment from participation in an absolutely unique "market" for federally-guaranteed loans, guaranties which the Bank and its farm borrowers were not free to seek elsewhere.

Finally, it is significant to note that, in its more recent opinions, the D.C. Circuit has demonstrated that it does not read ***Old Dominion*** as imposing so high a level of injury. In ***Mosrie v. Barry***, 718 F.2d 1151, 1161, 1162 (D.C. Cir. 1983), the court said:

> . . . [T]he principal recent cases from this court in which a government-imposed stigma was found to have deprived the

> stigmatized person of a liberty interest involved either loss of employment or foreclosure of a right to be considered for government contracts in common with all other persons.
>
> * * *
>
> An actual loss of employment *or change in legal status [is] sufficient to qualify as a deprivation of liberty* when accompanied by stigmatizing remarks.

And in *Doe v. United States Department of Justice*, 753 F.2d 1092 (D.C. Cir. 1985), a case involving the discharge under stigmatizing allegations of a DOJ attorney, the essential requirements of *Paul*'s "stigma plus" test were stated as follows:

> First, the government must be the source of the defamatory allegations. Second, the resulting "stigma" must involve *some tangible change of status vis-a-vis the government*.

753 F.2d at 1108-1109 (citation omitted) (emphasis added).

Under any reasonable standard, the

nature of the Bank's injury implicated a protected liberty interest, just as in the many other debarment cases. The court's subjection of that injury to an unarticulated ***magnitude*** analysis was error. It sends the unfortunate message to officials that violation of clearly established rights will not pierce damages immunity unless the destruction is total, or nearly so. To plaintiffs it may mean that, if official lawlessness has left them enough resources to mount litigation, then that litigation will be fruitless.

POINT III: The Bank's Right To Compete On An Equal Footing With Others For FmHA Loan Guarantees Is A Clearly Established Property Interest Which Cannot Be Extinguished Without Due Process Of Law

The court below gave short shrift to

the argument that debarment infringes a property interest. It pointed out that the Bank has no right to obtain FmHA loan guaranties, and that it therefore has no property interest in them.

However, the Bank never claimed a "right" to any government contract. It did not complain of any particular administrative decision rejecting a given loan application. It objected to summary debarment, or blacklisting, from all further relationships, from eligibility for consideration on a case-by-case basis. All the Bank, or any government contractor, is entitled to is a decision-making process which makes it reasonably probable that approval or rejection will be based on the merits. That is what due process is. The history of the Bank's dealings with the FmHA demonstrates quite

clearly, if demonstration were necessary,[11] that when the FmHA made its decisions on the merits (prior to the debarment), the Bank reaped substantial economic benefits. To no longer have access to a process in which decisions are probably made on the merits---which is what debarment or any other blacklisting means---is to suffer economic detriment.

The leading case, ***Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964), recognizes the distinction between the right to a contract and the right to eligibility.

---

[11] According to *Gonzalez'* wise counsel, of course, demonstration is *not* necessary. *See* 334 F.2d at 574; *see also* the Defendants' own regulations: "Debarment and suspension are drastic actions which may ***severely affect the economic well-being*** of the persons debarred or suspended." 7 C.F.R. § 1924.213(a) (emphasis added).

> It is . . . correct, broadly speaking, to say that no citizen has a "right," in the sense of a legal right, to do business with the government. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940). But use of such terms as "right" or "privilege" tends to confuse the issues presented by debarment action. ***Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.***

334 F.2d at 574 (emphasis added). The court concluded that contractors "have a right not to be debarred except in an authorized and procedurally fair manner . . ." *Id.* at 576.

Both the D.C. Circuit and the Second Circuit have suggested that debarment implicates a protected property interest. In ***Art Metal-U.S.A., Inc. v. United States***, 753 F.2d 1151 (D.C. Cir. 1985), a

contractor brought suit under the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 1346(b), 2671-2680 (1982), seeking damages for its unlawful de facto debarment from government contracting. Although the Court rejected the FTCA action, it intimated that an action for constitutional tort (such as the present action) might have fared differently:

> An examination of the regulations indicates that they essentially impose duties on GSA officials to deal fairly with government contractors. Moreover, the "fairness duties" are required of the government as a government under the due process clause of the United States Constitution, ***See Gonzalez v. Freeman***, 334 F.2d 570 (D.C. Cir. 1964). As Art Metal itself recognizes, the regulations are "designed to protect contractors' due process rights, liberty interests, and ***economic interests*** from an arbitrary, capricious, unfair, or incorrect debarment." Brief for Appellant at 33. These constitutional rights are

> guaranteed under federal law, not local law.

753 F.2d at 1160 (emphasis added). *See also* ***Myers & Myers, Inc. v. United States Postal Service***, 527 F.2d 1252, 1258-59 (2d Cir. 1975):

> Where a federal agency takes action to debar a private firm from further business relations with that agency the effect is far different from that of simply denying an application for a contract. [Quotation from ***Gonzalez v. Freeman***, ***supra***, omitted]. Denial of notice and a hearing before debarment would "give rise to serious constitutional issues," [***Id.***, 334 F.2d 570] at 579 . . . .

The Third Circuit adopted a similar view in the context of a 42 U.S.C. § 1983 action against state officials. *See* ***Berlanti v. Bodman***, 780 F.2d 296 (3d Cir. 1985), where it was held that an individual contractor had a property interest under New Jersey law in not

being debarred from state contract bidding.

The court below correctly pointed out that several post-***Gonzalez*** cases, notably ***ATL, Inc. v. United States***, 736 F.2d 677 (Fed. Cir. 1984), and ***Transco Security, Inc. v. Freeman***, 639 F.2d 318 (6th Cir. 1981), have rejected property interest analysis in debarments. However, in those cases, either the action at issue fell short of the across-the-board, indefinite-term debarment that here occurred, or the conclusion is, we submit, simply wrong. The error stems from the unexamined assumption that disqualification from consideration of all future applications is equivalent to denial of any one particular contract. ***Gonzalez*** should have made it clear that invoking the nostrum that "there is no

right to a government contract" does not end the analysis.

A blacklist is not the same thing as a snub. If the defendant officials had rejected one or two of the Bank's applications for an FmHA loan guarantee, the Bank would not be here. What the defendants did, however, was to notify the Bank that they would no longer ***consider*** the Bank's applications for loan guarantees, period. The right to have those applications considered, for acceptance or rejection, is unquestionably an interest of economic value. That it is an interest protected by the Constitution, an interest that cannot be expropriated without "either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment" was

established as early as ***Gonzalez***. 334 F.2d at 580.

Here, 25 years after ***Gonzalez***, the FmHA was supposed to be operating under regulations designed to ensure such fair treatment. The regulations, which these officials admittedly ignored, expressly recognize that debarment is a "drastic" action "which may severely affect the economic well-being" of the person debarred. 7 C.F.R. § 1924.213(a). Since the debarment of the Bank had precisely that effect, the officials should not be immune from a suit for damages.

CONCLUSION

The Eleventh Circuit found that the FmHA officials' conduct has "no place in government," and it insisted that

> the message to FmHA officials must be clear: They may not grant or deny the opportunity to participate in FmHA programs without following the agency's regulations.

980 F.2d at 1369. Yet, by denying the Bank a damages remedy, the court unintentionally sends a very different message. It tells the kind of officials whom only *Bivens* could control that they will not be called to personal account for the violation of clearly established rights. To recall that message, for all of the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be reversed.

Dated: April 6, 1993

Respectfully submitted,

MICHEL L. STONE

PAMELA DRU SUTTON

STONE & SUTTON, P.A.
116 East Fourth Street
Panama City, FL 32401
(904) 785-7272

and

JERRY W. GERDE
Counsel of Record for Petitioner
JOHNSTON, HARRIS, GERDE & JELKS, P.A.
239 East Fourth Street
Panama City, FL 32401
(904) 763-8421

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari, with separate Appendix, have been furnished to Michael S. Raab, Esq., and Barbara L. Herwig, Esq., Civil Division, Appellate Staff, U.S. Department of Justice, Room 3631, Main Justice Building, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, to Benjamin W. Beard, Esq., Assistant U.S. Attorney, 114 East Gregory Street, Pensacola, FL 32501-4972, and to the Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Supreme Court Rule 29, by U.S. Mail, on the 9th day of April, 1993.

JERRY W. GERDE